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## MEMORANDUM

TO: Committee on Legal Services

FROM: Megan McCall, Office of Legislative Legal Services

DATE: December 6, 2022

SUBJECT: Rules of the Executive Director, Department of Revenue, concerning Enterprise Zone Business Facility Employee Credits, 1 CCR 201-13, Rule 39-30-105.1 (LLS Docket No. 220186; SOS Tracking No. 2021-00688).<sup>1</sup>

### Summary of Problem Identified and Recommendation

Section 39-30-105.1, C.R.S., allows a taxpayer to claim an income tax credit for enterprise zone business employees. In establishing eligibility requirements for the income tax credit, section 39-30-105.1 (6)(b) and (6)(c), C.R.S., define the terms "business facility" and "facility". Neither definition requires permanency, but Rule 39-30-105.1 (1) of the executive director of the department of revenue (executive director) defines "business facility" to exclude certain temporary structures or mobile units. **Because Rule 39-30-105.1 (1) conflicts with statute, we recommend that Rule 39-30-105.1 (1) of the rules of the executive director concerning enterprise zone business facility employee credits not be extended.**

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<sup>1</sup> Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I)(A), C.R.S., the rules discussed in this memorandum will expire on May 15, 2023, unless the General Assembly acts by bill to postpone such expiration.

## Analysis

**The executive director's Rule 39-30-105.1 (1) limits the enterprise zone business facility employee income tax credit by narrowing the definition of "business facility" in a manner that conflicts with the statutory definition of "business facility".**

Section 39-30-108 (1), C.R.S., authorizes the executive director to promulgate rules and regulations for the implementation of tax credits available for certain activities occurring in enterprise zones, including the credit for enterprise zone business employees allowed in section 39-30-105.1, C.R.S. This provision states:

**39-30-108. Rules and regulations.** (1) In accordance with article 4 of title 24, C.R.S., the executive director of the department of revenue shall promulgate rules and regulations for the implementation of sections 39-30-103.5 to 39-30-107.5.

Section 39-30-105.1, C.R.S., allows a taxpayer that operates a business facility in an enterprise zone to claim an income tax credit for each business facility employee working at the facility, prorated according to the number of months that the employee was employed by the taxpayer during the income tax year. In establishing eligibility requirements for the income tax credit, the terms "building", "business facility", and "facility" are defined in section 39-30-105.1 (6) as follows:

**39-30-105.1. Credit for new enterprise zone business employees.** (6) As used in this section, unless the context otherwise requires:

(a) "Building" means only structures within which individuals are customarily employed or that are customarily used to house machinery, equipment, or other property.

(b) "Business facility" means a facility that is operated by the taxpayer in the operation of a revenue-producing enterprise. A facility is not considered a business facility in the hands of the taxpayer if the taxpayer's only activity with respect to the facility is to lease it to another person. If the taxpayer operates only a portion of the facility in the operation of a revenue-producing enterprise and leases another portion of the facility to another person or does not otherwise use the other portions in the operation of a revenue-producing enterprise, the portion operated by the taxpayer in the operation of a revenue-producing enterprise is considered a business facility.

(e) "Facility" means any factory, mill, plant, refinery, warehouse, feedlot, building, or complex of buildings located within the state, including the land on which the facility is located and all machinery, equipment, and other real and

tangible personal property located at or within the facility and used in connection with the operation of the facility.

The definition of "business facility" in Rule 39-30-105.1 (1) excludes temporary structures and mobile units unless used in association with one or more permanent structures that are a business facility (the exclusion). Rule 39-30-105.1 (1) states:

**Rule 39-30-105.1 Enterprise Zone Business Facility Employee Credits.**

(1) **Business Facilities.** The term "business facility" as defined in section 39-30-105.1(6)(b) and (e), C.R.S., **does not include any temporary structures or mobile units**, except where such temporary structures or mobile units are used in association with one or more permanent structures defined as a "business facility" by section 39-30-105.1(6)(b) and (e), C.R.S. **(Emphasis added).**

The exclusion in the rule is not based upon the statutory definition of "facility", which includes "**any** factory, mill, plant, refinery, warehouse, feedlot, building, or complex of buildings ..." and is incorporated into the statutory definition of "business facility". **(Emphasis added).** Thus, the rule narrows the applicability of the tax credit as set forth in statute by excluding taxpayers who employ workers at business facilities that are temporary structures or mobile units not used in association with permanent structures from receiving credits that they are entitled to receive under the statute. There is no requirement in section 39-30-105.1, C.R.S., that a business facility have permanence, nor does this section suggest an intent for permanence as a requirement for a taxpayer to be allowed to claim the credit under the statute. A conflict between the rule and the statute therefore exists, and the definition for "business facility" in Rule 39-30-105.1 (1) should not be extended.

## **Recommendation**

We therefore recommend that Rule 39-30-105.1 (1) of the rules of the executive director concerning enterprise zone business facility employee credits not be extended because the definition of "business facility" in Rule 39-30-105.1 (1) is more limited than the statutory definition of the same term and therefore conflicts with statute.